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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 93830-4
COA No. 46793-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NOLAN B. GWINN, SR.,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Nolan Gwinn, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Gwinn seeks review of Division Two's unpublished opinion in *State v. Gwinn*, No. 46793-3-II (Slip Op. filed January 26, 2016). No Motion for Reconsideration has been filed in the Court of Appeals. A copy of the opinion is attached.

C. ISSUE PRESENTED FOR REVIEW

1. Appellant was charged with felony violation of a protection order based on an allegation that he was at the residence of the protected party and that he repeatedly called the protected party. To prove felony violation of a court order, the State is required to prove the appellant had two prior convictions for violating no contact orders. Should this Court grant review where counsel did not object to evidence that not only had the appellant previously been convicted, but also that the protected party in the previous convictions is the complaining party in the current offense?

D. STATEMENT OF THE CASE

On March 18, 2015, Gwinn filed a brief alleging that the trial court had erred in regards to the above-indicated issue. The brief set out facts and law relevant to this petition and are hereby incorporated herein by reference.

E. ARGUMENT

It is submitted that the issue raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. GWINN RECEIVED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO OBJECT TO IRRELEVANT EVIDENCE SHOWING THAT HIS TWO PRIOR VIOLATIONS OF A NO CONTACT ORDER INVOLVING THE SAME COMPLAINANT AS IN THE CURRENT OFFENCE

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of

reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn,* 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland v. Washington,* 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas,* 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas,* 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland,* 466 U.S. at 693; *Thomas,* 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland,* 466 U.S. at 694; *Thomas,* 109 Wn.2d at 226.

Gwinn was charged with violating a protection order by going to Ms. Gwinn's house and repeatedly calling her. CP 6. The State submitted as proof of two prior violations in a Judgment and Sentence filed on September 10, 2010 in Olympia Municipal Court in which Ms. Gwinn

was the protected party. The Judgment and Sentence provides that Mr. Gwinn is required to have domestic violence treatment and that he is prohibited from having contact with Elizabeth Gwinn.

Evidence that the two prior violations both involved Ms. Gwinn as the protected person was irrelevant because the State was not required to establish for the current charge that the protected person was also Ms. Gwinn in the prior cases. RCW 26.50.110(5). While the fact that Mr. Gwinn had previously been convicted of violating a no contact order was unquestionably relevant to the charge in this case, the details of the two prior convictions were not.

Evidence showing that he had previously violated court orders protecting Ms. Gwinn was deeply prejudicial, effectively taking the form of inadmissible ER 404 (b) propensity evidence. The only purpose served by evidence that he had previously violated a no-contact order protecting Ms. Gwinn was to suggest that Mr. Gwinn was a criminal type who did not respect the prior no contact order obtained by Ms. Gwinn in the past and who therefore must be guilty in the current case as well. Nonetheless, trial counsel failed to object to the evidence regarding the identity of the protected party in the two prior convictions.

It was ineffective for Mr. Gwinn's counsel to fail to object to evidence that Ms. Gwinn was the complainant in the prior offenses that the

state proved as an element of the felony violation of a no contact order. To compound the error and underscore for the jury that Ms. Gwinn was the complainant in at least one prior violation of an order, defense counsel elected testimony from Ms. Gwinn that Mr. Gwinn had previously violated a no contact order in which she was the protected party, for which Mr. Gwinn "got in trouble." 1RP at 136.

If an element of the charged offense is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime. *State v. Roswell*, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). Such evidence is often "highly prejudicial." *Old Chief v. United States*, 519 U.S. 172, 185, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

In *Old Chief*, 519 U.S. 172, the United States Supreme Court recognized that a defendant may be prejudiced by evidence regarding a prior conviction and held that he may stipulate to the fact that he has a prior conviction in order to prevent the State from introducing evidence concerning details of the prior conviction to the jury.

ER 404(b) forbids evidence of prior acts which establishes only a defendant's propensity to commit a crime. *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not

convicted because the jury believes he is a bad person who has done wrong in the past. *State v. Lough,* 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Here, the trial court would have likely sustained an objection to the evidence showing that Gwinn previously violated a no contact order involving Ms. Gwinn on ER 404(b) grounds, or at least permitted the defense to stipulate to the existence of the convictions without introduction of the unredacted Judgment and Sentence containing Ms. Gwinn's name. The specific detail of the complainant's identity in the prior convictions was not relevant at trial to the extent that the prior convictions both pertained to Ms. Gwinn and were unduly prejudicial to the defense, calling attention to his criminal propensity. Had defense counsel stipulated to the existence of the prior convictions, the trial court would have been bound to accept the stipulation. There was no valid strategic reason to fail to object to specific evidence regarding the offense and stipulate where there was no dispute regarding the existence of the prior convictions.

Counsel was deficient in failing to object to the evidence, as Mr. Gwinn derived no conceivable benefit from this evidence.

Division 2 oh the Court of Appeals found that the decision not seek redaction or otherwise stipulate to the prior convictions was a

strategic decision by counsel. *Gwinn*, No. 46793-3-II, slip op. at 5-6. Gwinn submits, however, that trial counsel's failure to challenge admission of the prior convictions and seek redaction, if strategic, was an unnecessary choice because it forced counsel into the position that the prior convictions necessary came in, and that counsel essentially "authorized" the State to introduce the highly prejudicial evidence of prior convictions for the precise offense.

Instead of being boxed into that position, counsel could have moved for the prior convictions to simply be termed as "prior qualifying offenses" or something similar without the necessity of naming the complaining witness in the Judgment and Sentence, or counsel could have sought the approach endorsed in *Roswell*, and submitted the prior conviction element to the jury by referencing the relevant statutory subsections without naming the underlying charge. Since juries are prohibited from conducting outside research, they would not have known that the convictions were for prior no-contact order violations. Either approach would have permitted a verdict on each element of the charged offense, but prevented the unfair prejudice of the jury hearing that Gwinn had twice been convicted of prior similar offenses.

Gwinn was prejudiced by counsel's error. The propensity evidence guaranteed the outcome of guilty verdict. Once it learned from inspection of the judgment entered as Exhibit 1 that the appellant had previously done exactly what he allegedly did in the present case—violated a court order protecting Ms. Gwinn—the conviction was essentially made a *fait accompli* by the improper inference that the defendant was a criminal type who had committed essentially identical violations against Ms. Gwinn in 2010, and he therefore must be guilty of the charged offense. Counsel's failure to object to the evidence or stipulate to the two prior convictions undermines confidence in the outcome of the case, and reversal is required.

The Court of Appeals' affirmance of Gwinn's conviction was based on a cursory assessment of the facts and merits review by this Court.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse and remand consistent with the arguments presented herein.

DATED this 22nd day of February, 2016.

Respectfully submitted:

PETER TILLER WSBA 20835
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on February 22, 2016, copy of the Petition for Review, was sent via JIS link to the Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and true and correct copies were mailed by first class mail, postage prepaid Ms. Carol L. La Verne, Thurston County Prosecutor's Office, 2000 Lakeridge Dr SW Bldg 2, Olympia, WA 98502-6045, and to the appellant, Mr. Nolan Gwinn, Sr. DOC#880682 Larch Correction Center, 15314 NE Dole Valley Road, Yacolt, WA 98675-9531 **LEGAL MAIL/SPECIAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 22, 2016.

PETER B. TILLER

Filed
Washington State
Court of Appeals
Division Two

January 26, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NOLAN BROOKS GWINN, SR., Appellant.	No. 46793-3-II UNPUBLISHED OPINION

JOHANSON, C.J. — A jury found Nolan Brooks Gwinn Sr. guilty of one count of felony violation of a no-contact order (VNCO). Gwinn appeals his conviction, arguing that he received ineffective assistance of counsel because trial counsel failed to object to evidence that Gwinn had previously been convicted of VNCO involving the same protected party as the current offense. We hold that Gwinn cannot establish that he received ineffective assistance of counsel because counsel's failure to object was a legitimate trial strategy. We affirm.

FACTS

In July 2014, Elizabeth Gwinn drove home to pick up her son. When she arrived, she saw Gwinn, her former husband, standing in the driveway. Elizabeth[1] told Gwinn that he was not

[1] We refer to Elizabeth Gwinn by her first name for clarity, intending no disrespect.

permitted to be there because of the court order prohibiting him from contacting her, and Gwinn agreed to leave after Elizabeth threatened to call police.

That evening, Elizabeth again observed Gwinn on the walkway outside her home. She threatened to call 911. Gwinn left the residence, but shortly thereafter, Elizabeth began to receive phone calls from Gwinn. After "dozens" of calls, which included statements from Gwinn that he was coming back to her home, Elizabeth called police. Olympia police officers arrested Gwinn the next day. The State charged Gwinn with felony VNCO because Gwinn had previous convictions for VNCO.

At trial, the investigating police officer explained that at the time of the alleged crime, there was a valid Olympia Municipal Court order prohibiting Gwinn from contacting Elizabeth. The order also barred Gwinn from coming within 1,000 feet of Elizabeth's residence. Because the State was required to prove that Gwinn had twice previously been convicted for VNCO for purposes of the current felony charge, it introduced a 2010 judgment and sentence showing two such convictions. This judgment and sentence listed Elizabeth as the party with whom contact was prohibited.

During Elizabeth's cross-examination, Gwinn's trial counsel elicited testimony that Gwinn had contacted Elizabeth at least once prior when he was not permitted to do so and that he had been charged on that occasion. And in closing argument, Gwinn's defense counsel cited Elizabeth's desire to be "done with" Gwinn and implied that Elizabeth made the police report as a way to accomplish that goal. 1 Report of Proceedings (RP) at 168. The jury found Gwinn guilty as charged. Gwinn appeals.

ANALYSIS

Gwinn argues that he received ineffective assistance of counsel because defense counsel failed to object when the State presented evidence that Gwinn had two previous convictions for VNCO and that Elizabeth was the protected party in each of the earlier incidents. We hold that counsel's performance was not deficient because he used the fact that Elizabeth was a party to the other convictions as a legitimate trial strategy.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). We review an ineffective assistance claim de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (citing *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). To establish deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362. To establish prejudice, a defendant must show that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. We do not have to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Given the deference we afford defense counsel's decisions in representation, the threshold for deficient performance is high. *Grier*, 171 Wn.2d at 33. There is a strong presumption counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable

professional judgment. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Thus, "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863. Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Gwinn argues that his trial counsel should have objected to the State's use of the prior judgment and sentence because it listed Elizabeth as the protected party to a no-contact order. In Gwinn's view, although his prior convictions for VNCO were unquestionably relevant because they were an element of the charged crime, it was unnecessary and irrelevant to include a reference to Elizabeth's name because the law does not require that the two previous convictions involve the same victim.[2] According to Gwinn, counsel's failure to request a redaction—or to stipulate to the

[2] Former RCW 26.50.110 (2013), which governs violations of VNCOs, provides in pertinent part,

> (1)(a) Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:
>
> . . . .
>
> (5) A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

existence of the prior convictions—was prejudicial because it was essentially propensity evidence.[3]

Here, the record shows a valid strategic reason for counsel's failure to object. During Elizabeth's cross-examination, the following exchange occurred:

> [GWINN]: But you wanted to be free of [Gwinn].
> [ELIZABETH]: Yes.
> [GWINN]: [Elizabeth], at least on one prior occasion, you know that [Gwinn] had contact with you when he wasn't supposed to --
> [ELIZABETH]: Um – hmm.
> [GWINN]: -- and he was charged, and he got in trouble for that.
> . . . .
> [GWINN]: At least on one other occasion.
> [ELIZABETH]: Yes.
> [GWINN]: So you know that if the police are called and there's a no contact order, that that's a way you can be free of him.

1 RP at 136.

The evidence against Gwinn was strong and the quoted passage demonstrates that Gwinn's trial counsel's defense strategy was to challenge Elizabeth's credibility and to attempt to establish that she had an ulterior motive when she called police during the incident. In closing argument, counsel again suggested that Elizabeth filed a report because there was "no better way to make a break [from Gwinn]." 1 RP at 168. Defense counsel attempted to convince the jury that Elizabeth's report was motivated by her disdain for Gwinn rather than by his violation of the order.

For counsel's defense theory to be viable, it required that the jury have knowledge of Gwinn's previous VNCO convictions where Elizabeth was the protected party. For this reason, it was immaterial to Gwinn's counsel that the judgment and sentence suggested that Elizabeth had

[3] Gwinn likens the State's use of the judgment and sentence document to improper ER 404(b) evidence.

been the subject of other court orders that Gwinn violated. That evidence in fact corroborated the defense theory. This was clearly a strategic decision and we presume that counsel has made all significant decisions by exercising reasonable professional judgment. *Lord*, 117 Wn.2d at 883. Because counsel's conduct can be categorized as a legitimate trial strategy, we hold that counsel's performance was not deficient and, therefore, Gwinn's ineffective assistance of counsel argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Worswick, J.
WORSWICK, J.

Lee, J.
LEE, J.

TILLER LAW OFFICE

February 22, 2016 - 4:58 PM

Transmittal Letter

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